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No. 82-674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN CHRISTOPHER BEALE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Amendment requires that law enforcement officials have a reasonable suspicion that luggage contains contraband before exposing it to a sniff test by a trained narcotics detection dog.

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Respondent John Christopher Beale, by and through his attorneys of record, oppose the Government's Petition for a Writ of Certiorari and will represent that this cause need not be reviewed by this Court.

OPINION BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 1327 and Respondent hereby incorporates by reference Petitioner's Appendix (Pet. App. A, 1a-17a).[1]

[1]The opinion as reported does not contain the modifications made by the court of appeals in its July 21, 1982, amendment to the decision. See Pet. App. B, 18a.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A, 17a) was entered on April 22, 1982. A petition for rehearing was denied on August 5, 1982 (Pet. App. C, 19a). On September 20, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his suppression motion, respondent was convicted at a bench trial on stipulated facts in the United States District Court for the Southern District of California of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Pet. App. A, 1a, 4a). He was sentenced to concurrent terms of 30 months' imprisonment on each count, to be followed by a seven-year special parole term. The Court of Appeals vacated the conviction on the ground that the district court had erred in denying the suppression motion.

1. The evidence adduced at a suppression hearing showed that on April 17, 1980, Detective Rick Berks and Deputy Larry Burk of the Broward County, Florida, Sheriff's Department were assigned to the airport narcotics interdiction detail at the Fort Lauderdale Airport.[2] While watching passengers in the vicinity of the National Airlines terminal, Detective Berks observed Respondent and codefendant Joseph Pulvano[3] leave a taxicab, check three

[2]Respondent's trial consisted of the filing of a stipulation ("Stip.") by the parties to certain facts developed during the suppression hearing, which was made a part of the trial record, and the entry of a guilty verdict by the court on the basis of the stipulated facts (Tr. 80-82).

[3]Pulvano pled guilty to a conspiracy charge following the denial of his suppression motion (Tr. 80) and was not a party on appeal.

pieces of luggage including a large maroon suitcase, and enter the terminal together. Upon reaching a security checkpoint inside, the two men separated and independently approached the ticket counter, but then sat together in the boarding area. After observing this behavior, Detective Berks determined that the two men had obtained separate seating assignments on a National Airlines flight to San Diego, California, with a change of planes in Houston, Texas. Detective Berks also examined the labels on the Defendant's luggage and noticed that Pulvano was watching him while he examined the bags (Pet. App. A, 2a; Tr. 6-7; Stip. 2-3).

Detective Berks then approached the two men, identified himself, and asked whether they objected to answering a few questions. When they responded that they did not, the officer explained that they were not under arrest, but asked to see their identification and inquired whether either of them had ever been arrested. Petitioner displayed a New Jersey driver's license; Pulvano, who appeared extremely nervous, stated that his identification was in his suitcase and that he had been arrested on a narcotics charge six years earlier. Detective Berks then thanked them for their cooperation and walked to the other side of the boarding area. Approximately five minutes later, Pulvano approached Detective Berks and inquired whether anything was wrong. The officer responded that there was no problem at that time (Pet. App. A, 2a-3a; Tr. 8-10; Stip. 3).

While Detective Berks was speaking with Respondent and Pulvano, Officer Burk obtained a trained narcotics detection dog. After Detective Berks concluded his conversation with the Defendants, the officers went to the baggage loading ramp adjacent to the National Airlines ticket counter, which contained the baggage that Respon-

dent and Pulvano had checked. The dog immediately "alerted" to Respondent's large maroon suitcase, indicating that it contained narcotics (Pet. App. A, 3a; Tr. 10-11; Stip. 3).

The officers then requested a computer check on the two men, which revealed that Pulvano had been arrested and convicted about six months before for possession of cocaine. Detective Berks then telephoned law enforcement officials at the airports in Houston, Texas, and San Diego, California, notifying them of the events that had transpired (Pet. App. A, 3a; Tr. 12-13; Stip. 3-4). Police officers in Houston kept Respondent and Pulvano under surveillance as they changed planes there, observing that the two men acted as though they were traveling separately (Pet. App. A, 3a; Tr. 14; Stip. 4).

When the two men deplaned in San Diego they were again observed by law enforcement officers, who noted that they did not appear to be traveling together and behaved as though they feared surveillance. As the reached the front of the terminal, Pulvano stopped at a telephone; Respondent walked directly to a taxi without making any effort to retrieve his luggage (Pet. App. A, 3a; Tr. 49-50; Stip. 5). Police officers then approached Respondent and asked him about his luggage. In response, he stated falsely that he was traveling alone and that he had lost his claim ticket. There upon the officers advised him that he was under arrest and escorted him back to the terminal (Pet. App. A, 3a; Tr. 50-53; Stip. 5-6).

While Respondent and Pulvano were under surveillance, other officers took a trained narcotics detection dog to the baggage claim area, and this dog also alerted to Respondent's large maroon suitcase (Pet. App. A, 3a; Tr. 29; Stip. 6-7). Shortly thereafter, the officers observed

Pulvano retrieve the bags from the luggage carousel and proceed toward the nearest exit. The officers then stopped him and escorted him to the airport Narcotic Task Force Office where he consented to a search of all the bags except the maroon suitcase (Pet. App. 4a; Tr. 30-32; Stip. 7). Subsequently, when Respondent arrived at the Narcotics Task Force Office, the dog also alerted to the shoulder bag that Respondent had been carrying (Pet. App. A, 4a; Tr. 63-64; Stip. 8).

Based on this information, the police obtained a search warrant from a state court judge for the two suitcases to which the dog had alerted. The ensuing search revealed that Respondent's shoulder bag contained approximately one kilogram of cocaine and that the maroon suitcase contained approximately 137 grams of marijuana (pet. App. A, 4a; Tr. 35; Stip. 8).

2. The district court denied the motions of Respondent and Pulvano to suppress the evidence obtained as the result of these searches (Tr. 7278). The Court rejected the contention that probable cause was required for the police at the Fort Lauderdale Airport either to remove the bags from the airline luggage rack or to expose them to a narcotics detection dog, explaining that "the present state of the law is that the dog search in Fort Lauderdale and here is not a search under the Fourth Amendment" (Pet. App. A, 5a n.4; Tr. 72).

3. The Court of Appeals vacated the conviction and remanded (Pet. App. A, 1a-17a). The court held that "the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage is a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable

cause" (id. at 15a; footnote omitted; emphasis deleted).[4] Accordingly, the court of appeals remanded to the district court for a determination whether the officers who exposed Respondent's luggage to a trained dog at the Fort Lauderdale airport possessed the requisite suspicion that it contained contraband (id. at 16a-17a).

The Court explained that the Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy" (Pet. App. A, 7a, quoting *United States v. Chadwick*, 433 U.S. 1, 7 (1977)). The use of a trained dog to detect contraband within personal luggage, the Court stated, violated such an expectation of privacy. The Court acknowledged that if the odor of drugs emanating from a suitcase were detectable by the human nose, there would be no Fourth Amendment intrusion (Pet. App. A, 10a), but it held that the use of a trained dog did constitute such an intrusion. The Court explained (id. at 12a-13a; footnote omitted):

> The molecules of contraband emanating from the interior of luggage are so subtle and incapable of human perception that a canine's detection of them constitutes an intrusion into the owner's privacy interest in the contents of the container.***
>
> To Paraphrase Katz (v. United States, 389 U.S. 347 (1967)), what (Respondent) sought to exclude when he locked his suitcase was not only the intruding human eye - it was also the intruding canine nose. One who reposes his per-

[4]The Court rejected Respondent's contention that the officer's approach to him in Fort Lauderdale violated the Fourth Amendment. The Court held that the situation was "non-coercive" and that Respondent and Pulvano answered the questions " 'in a spirit of apparent cooperation' "; hence, the encounter was not a "seizure" under the Fourth Amendment. See Pet. App. A, 4a-5a.

> sonal effects, including contraband, in a locked suitcase is surely entitled to assume that a trained canine will not broadcast its incriminating contents to the authorities.

Hence, the Court concluded that the Fourth Amendment requires a threshold of reasonable suspicion[5] before law enforcement officers may employ a dog to determine whether or not a suitcase contains contraband (id. at 15a).[6]

SUMMARY OF ARGUMENT

Fourth Amendment law recognizes a legitimate expectation of privacy in a person's luggage. Under such protection law enforcement officials are required to have a reasonable suspicion that luggage contains contraband before exposing it to a sniff test by a trained narcotics detection dog.

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[5]The Court of Appeals rejected Respondent's contention that dog sniffs are indistinguishable from the use of magnetometer or an x-ray machine and hence unlawful in the absence of probable cause. Finding that the use of narcotics detection dogs is less intrusive than such techniques because a dog detects only the presence or absence of contraband, the Court heid that a less rigorous standard than probable cause was appropriate. See Pet. App. A, 13a-14a.

[6]The Court of Appeals recognized that its decision was contrary to decisions in several other courts of appeals (Pet. App. A, 6a-7a, 15a n.20). The Court stated that, in its view, those decisions holding dog sniff tests of luggage to be permissible in the absence of reasonable suspicion were no longer sound in light of this Court's decision in *United States v. Chadwick, supra,* which recognized the importance of an individual's privacy interest in personal luggage (Pet. App. A, 6a-8a, 10a). With respect to those contrary court of appeals decisions rendered subsequent to *Chadwick,* the court below announced that it "decline(d) to follow them" (Pet. App. A, at 15a, n.20).

ARGUMENT

It is well settled that the essence of a search is the intrusion into an area which the owner or possessor is entitled to enjoy as private. *United States v. Bronstein,* 521 F.2d 459 (2nd Cir. 1975), *cert. denied,* 424 U.S. 918, 96 S.Ct. 1121, 47 L. Ed. 2d, 324 (1976). Clearly there cannot be such intrusion where a human being can with his own senses and without physical investigation, ascertain the contents of a particular area. However, where one must rely on the use of certain aids or instruments such as binoculars, flashlights, hidden microphones, or even marijuana-sniffing dogs, the answer is not as clear.

In wrestling with Fourth Amendment considerations, courts have drawn distinctions between the use of certain "sense - enhancing" instruments that aid in the detection of contraband, and independent monitoring devices, such as drug-trained canines. See *United States v. Lee,* 274 U.S. 559, 563, 47 S.Ct. 746, 71 L. Ed. 1202 (1927). In conjunction with this is the level of privacy associated with the area that is searched. *United States v. Chadwick,* 433 U.S., 97 S. Ct. 2481 (1977). The necessary inquiry in the instant case, then, relates to the use of drug-trained canines for the explicit purpose of detecting contraband within personal luggage.

The Supreme Court has indeed recognized that "luggage is a common repository for one's personal effects, and therefore is *inevitably* associated with the expectation of privacy." *Arkansas v. Sanders,* 442 U.S. 753, 762, 99 S. Ct. 2586, 2592, 61 L. Ed. 2d 235 (1979) *(emphasis added).* "[T]he critical factor relied on *(in Arkansas v. Sanders,)* was the objective nature of the suitcase as personal luggage, i.e., the inherent nature of the container itself rather than the behavior of its owner." *United States v. Cleary,*

656 F.2d 1302, 1304 (9th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3466 (U.S. Nov. 20, 1981) (No. 81-953).

Under our fact situation, the obvious question presented is whether the detection of the odoriferous drug by the use of the sensitive and schooled canine senses employed, constitutes an invasion of Respondent's "inevitable" and "inherent" privacy interest in the contents of his luggage. Petitioner would argue that a canine's detection of molecules of contraband in the air surrounding Respondent's luggage does not constitute an intrusion into his privacy interest in the content of said luggage, since there is no physical invasion of a private area.

This Court has previously held, however, that a surveillance technique may implicate the Fourth Amendment concerns even if there is no physical invasion of a private area. *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In *Katz* the warrantless bugging of a public telephone booth was found to violate the Fourth Amendment and the Court explained there that:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.*** But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-352. By way of analogy, in drawing upon *Katz,* the court of appeals recognized Respondent's legitimate expectation of privacy not only in the contents, but in the odors emanated as well. Thus, "the use of sophisticated modern mechanical or electronic devices and the frightening implications of their possible development have led to abandonment of the test of physical trespass within the protected area and broadening of protection to

cover a 'reasonable expectation of privacy' " *Katz, supra* at 360.

In delivering his concurring opinion in the *United States v. Bronstein, supra* at 464, Circuit Judge Mansfield stated:

> [T]he police have been permitted to enhance or magnify the human senses with the aid of instruments such as binoculars or flashlights, *** (b)ut that is not the case here where the nose being put into other's business was clearly an intrusion.

The police agents here did not smell or see any contraband, nor were their senses enhanced. The only indication that marijuana was present was the action of the dog. Their own senses were replaced by the more sensitive nose of the dog in the same manner that a police officer's ears are replaced by hidden microphone in areas where he cannot otherwise hear because of the inaudibility of the sounds. The illegality of the latter practice in the absence of a search warrant for special circumstances has long be established. *Katz, supra.* In his opinion, Judge Mansfield concluded there was "no legally significant difference between the use of any X-ray machine or magnetometer to invade a closed area in order to detect the presence of a metal pistol or knife," which has been held to be a search, *United States v. Alvarado,* 495 F.2d 799 (2d Cir. 1974), "and the use of dog to sniff for marijuana inside a private bag. Each is a non-human means of detecting the contents of a closed area without physically entering into it." *Bronstein, supra* at 464. Even though neither intrusion is particularly offensive, the fact remains that each detects hidden objects without actual entry and without the enhancement of human senses. "The fact that canine's search is more particularized and discriminate than that of the magnetometer is not a basis for a legal distinction. Judge Mansfield states that:

> [t]he important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search.
>
> If, as we have held, examination of carry-on luggage and individual passengers by a magnetometer or X-ray machine amounts to a search within prohibition of the Fourth Amendment because it discloses hidden items within areas where there is a normal expectation of privacy, *United States v. Alvarado, supra,* 495 F.2d at 802-03, then the intrusion of a sniffing dog in search of marijuana must also fall within that prohibition when directed at hidden areas where there is similarly a normal expectation of privacy" *Bronstein, supra* at 464.

In a more recent case handed down from the Tenth Circuit, *United States v. MacDonald,* 670 F.2d 910 (1982), the Court of Appeals commented on the standard of reasonable suspicion required in utilizing a dog search in stating:

> Other courts that have addressed the substantive issue have held that so long as the police reasonably suspect criminal activity, they may temporarily detain baggage or move it to permit examination by drug-detecting dog without violating the baggage owner's Fourth Amendment interest in privacy.

United States v. West, 651 F.2d 71, 74 (1st Cir. 1981); *United States v. Viegas,* 639 F.2d 42, 54 (1st Cir.), *cert. denied,* 451 U.S. 970, 101 S. Ct. 2046, 68 L. Ed.2d 348 (1981); *United States v. Goldstein,* 635 F.2d 356, 361-62 (5th Cir.), *cert. denied,* ____ U.S.____, 101 S.Ct. 3111, 69 L. Ed.2d 972 (1981); *United States v. Klein,* 626 F.2d 22 (7th Cir. 1980).

Similarly, Judge Mansfield expressed the same concerns over such searches:

> [I]t is not unreasonable, where the police have reasonable grounds to suspect the presence of contraband, to permit use of an external method or device to determine whether the baggage contains contraband. On this ground I will uphold the search here. However, I will strictly limit such a search to cases where there are grounds for such a suspicion, similar to or stronger than that presented here. I would not permit a wholesale examination of all baggages in the hope that a crime might be detected.

Bronstein, supra at 465.

In the final analysis, the question of whether the use of a trained canine to detect the presence of concealed contraband is a search, must be determined by the justified-expectation-of-privacy-test applied originally in the case of *Katz v. United States, supra.* Under *Katz,* "the critical question is the kind of intrusion that a free society is willing to tolerate." That is, a valued judgment must be made whether the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints. In effect, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.

Totally unrestrained use of trained dogs, it is submitted, would not be consistent with the kind of open society to which we are committed. It would be intolerable if the police, in no way limited by the Fourth Amendment, were free to utilize dogs to undertake "a wholesale examination of all baggage in the hope that a crime might be detected" or "to roam the streets at will with trained dogs or sensor instruments, detecting the odor of marijuana and arresting

persons at will as a result." See *State v. Elkins*, 47 Ohio App. 2d 307, 357 N.E. 2d 716 (1976).

As Judge Mansfield so wisely cautioned us in *Brontein:*

> Otherwise, as the majority recognizes, the spectre of a "Big Brother" baggage search, uncurbed by the Fourth Amendment, would then loom much larger on the horizon. As more sophisticated detection devices are developed in the future, such a broad authority would be an open invitation to conduct blanket examinations, thus eroding the principals of the *Fourth Amendment* itself.

CONCLUSION

Respondent prays that the Government's Petition For A Writ of Certiorari be denied.

Respectfully submitted,

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January, 1983